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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE ANGEL HERRERA, Defendant and Appellant.	B189842 (Los Angeles County Super. Ct. No. BA250088)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rand S. Rubin, Judge. Affirmed and remanded.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Robert F. Katz and Richard S. Moskowitz, Deputy Attorneys General, for Plaintiff and Respondent.

Jose Angel Herrera, also known as Jose Luis Herrera and Angel Herrera, appeals from a judgment entered upon his conviction by jury of first degree murder (Pen. Code, § 187, subd. (a)).[1] The jury also found to be true the special circumstance allegations of murder by active participant in a criminal street gang to further promote its activities (§ 190.2, subd. (a)(22)), murder of a witness (§ 190.2, subd. (a)(10)), and murder by lying in wait (§ 190.2, subd. (a)(15)). It further found to be true the allegations that defendant personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (b), (c), (d), and (e)(1) and committed the offense to benefit a criminal street gang within the meaning of section 186.22, subdivision (a). The trial court sentenced defendant to life in prison without the possibility of parole for the murder conviction plus 25 years to life for the firearm use. Defendant contends that (1) the trial court prejudicially erred in excluding relevant expert identification testimony, thereby denying him of his constitutional right to present a defense, (2) the trial court abused its discretion under Evidence Code section 352 by allowing the prosecutor to elicit evidence that a witness was fearful and had an altruistic motive to identify defendant, (3) the California death penalty law violates the Eighth Amendment of the United States Constitution by proliferating special circumstances and thereby undermining their required narrowing function, (4) his sentence of life in prison without the possibility of parole is cruel and unusual punishment pursuant to the state and federal Constitutions, and (5) the $5,000 parole revocation fine imposed should be stricken because defendant was sentenced to life in prison without the possibility of parole. The Attorney General contends that if the parole revocation fine is stricken, the matter should be remanded to the trial court to adjust the restitution fine accordingly.

We strike the parole revocation fine and otherwise affirm.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

FACTUAL BACKGROUND

The prosecution's case

The Sanchez murder

On April 21, 2002, Arturo Sanchez (Sanchez) and Rickey Esparza (Esparza)[2] were the objects of a drive-by shooting. Sanchez was killed, but Esparza escaped unhurt. Both were members of the Opal Street gang. Kevin Woodruff (Woodruff) and Eric Villa (Villa), members of the rival gang, Varrio Nuevo Estrada (VNE), were accused of the murder.

Detective Thomas Herman investigated the shooting. On the night it occurred, he interviewed Esparza, who said that shortly before the shooting another car had approached and asked him and Sanchez, "'Where are you from?'" One of them said, "'Opal Street,'" and the shooting began. Esparza identified Woodruff and Villa from a VNE gang book as involved in the shooting.

Detective Herman prepared a "murder book," containing the names of the prosecution's witnesses, with their addresses and telephone numbers redacted. It was transmitted to defendants' counsel before the preliminary hearing, through the prosecutor in the Woodruff and Villa matter.

The Esparza murder

On July 29, 2002, Carmen Placencia (Placencia) resided on the 1100 block of Spence, in the City of Los Angeles, where she had lived for 10 years. She did not know Esparza, although she had seen him in the neighborhood and was acquainted with his mother. At 6:30 or 7:00 p.m. on that day, she and her two sons were walking home, and she saw a black car with tinted windows parked in a red zone in front of her house.[3]

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[2] In portions of the reporter's transcript Esparza is referred to as "Estrada."

[3] Placencia had previously reported that she came home between 8:20 and 8:35 p.m. and testified at the preliminary hearing it was between 7:15 and 7:30 p.m. When

Placencia entered her house, later exiting the back door to hang laundry. She again saw the black car. She also saw Esparza riding his bicycle on the other side of Garnet and heard friends call to him. Placencia then returned to her kitchen.

At approximately 8:25 p.m., through her window, Placencia observed defendant exit the black car and stand on the sidewalk at the corner for approximately five minutes, watching Esparza and his friend, Davey. Esparza got on his bicycle again and started in the direction of his home. When he saw defendant, he got off of his bicycle, looked frightened, and walked toward him. When he got close, defendant quickly reached toward Esparza's side with his left hand, put his right hand behind Esparza's back and jerked his arm. Placencia then heard six shots fired within a few seconds and ducked. She crouched her way into the living room, peeked through the window and saw the black car that had been parked in the red zone leaving.

Placencia went outside and saw Esparza lying on the sidewalk, saying, "'Help me.'" She stayed with him while a neighbor got his mother. Placencia's husband telephoned 911. Davey, came over and asked Esparza what happened. Esparza said, "'Angel the one from the projects.'" Only Placencia, Davey and two of Davey's friends were present when this statement was made. Placencia was with Esparza before Arlette Urzua (Urzua), another neighbor and ex-girlfriend of Esparza, exited her apartment. Urzua never came near where Esparza was lying, but immediately returned to her apartment. When Esparza's mother came to his side, he told her that he loved her. At approximately 8:30 p.m., police responded to the scene. An autopsy concluded that Esparza died of multiple gunshot wounds fired in rapid succession.

A week after the shooting, Placencia saw the black car, with defendant inside drive by her house. He was not driving and looked at her house through the open car window. A week later, the car drove by again with defendant inside.

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confronted with these inconsistencies with her trial estimate of 6:30 to 7:00 p.m., she testified that she did not know what time it was.

The Esparza murder investigation

Two days after the shooting, Officer Pat Austin interviewed Placencia at the police station. Afraid for her safety and reluctant to get involved, Placencia did not reveal everything she had seen. She said she saw Esparza being shot, described the car she had seen leaving and what the shooter looked like, although claiming she was uncertain. She did not report what Esparza told Davey about who shot him, claiming she did not understand what he was saying because it was in English. She said she heard Davey and his friends talking about someone from the projects, but that no name was mentioned. When shown a book of VNE gang photographs, on seeing defendant's photograph, she said it "might be him and . . . might not."

At a second meeting with Officer Austin, two weeks after the first and after she had twice seen the black car, Placencia failed to report seeing the car, instead saying that some boys had seen it and thought it was dark green. While she told Officer Austin that she believed Esparza knew who shot him and told his friend, she again did not say that she heard Esparza identify the shooter. She lied about these things because she did not want to get involved, but she urged the officer to speak with Esparza's friend David. She said she was afraid that "they might do something to us." Officer Austin showed Placencia a photographic six-pack which included a photograph of defendant. She immediately recognized him, but said she was unsure. A few months after the interview, Placencia moved.

On April 15, 2003, feeling safer after moving, Placencia spoke with Detective Herman. She identified a photograph the detective showed her of the vehicle she had previously described. She told him everything she knew, including that she was positive the shooter exited from the black car, that she heard Esparza say that the person who shot him was Angel from the projects, and that she had seen the car in the neighborhood twice after the shooting. She also positively identified defendant as the shooter from a six-pack and said that she had been positive of his identity all along, but was afraid to say so during the first two interviews because she still lived in the same neighborhood. She

feared for her life because Esparza's mother told her that her son was killed for cooperating with the police.

A week later, Placencia gave a more detailed recorded interview. On February 5, 2004, she identified defendant in a lineup. She also identified him at the preliminary hearing.

Detective Herman went through the evidence recovered in the Woodruff and Villa investigation because Esparza was scheduled to be a witness in that case. The evidence included more than 20 gang photographs and gang paraphernalia. One of the photographs depicted defendant and Woodruff "with their arm[s] around each other flashing gang signs."

At trial, Placencia identified the photograph of the black car as the one she had seen parked in front of her residence. She said that she was certain defendant was the shooter from the beginning. She was still afraid of defendant and avoided looking at him in court. The last time she came to court, she wore a wig and sunglasses. She nonetheless came forward because she believed that criminals should not get away with their crimes.

Gang evidence

A gang expert, Detective William Eagleson, testified that the Opal Street gang and VNE were rivals. VNE is a criminal street gang involved in prison gangs and its members have committed murders, attempted murders, robberies, carjackings and numerous other crimes. Defendant was an active VNE gang member, with the monikers "Shy Boy" and "Angel." The shooting of Sanchez was for the benefit of VNE. It would have bolstered the gang's image to those wanting to join gangs, intimidate rivals and instilled fear in neighborhood residents. The murder of Esparza was also for the benefit of the VNE gang because the shooting took out a "rat," who was testifying against a "homeboy," and sends a message to the neighborhood that VNE does not tolerate "rats."

Detective Eagleson received an anonymous letter describing the vehicle used in Esparza's murder as a "black four-door Honda Accord with chrome wheels and tinted windows," and identifying its license plate. It said that the driver was a VNE gang

member. Department of Motor Vehicle records indicated that the vehicle belonged to a VNE gang member named David Armendariz.

The defense's case

Defendant asserted an alibi defense. He claimed he was at a birthday party for Amanda, the daughter of his cousin by marriage, Donna Navarro. He called Donna, Dora Navarro, his aunt; Yesenia Saucedo, Maribel Navarro and Alejandro Navarro, his cousins; and Debrina Figueroa, Amanda's godmother, to testify. They testified that they were present at Amanda's birthday party on July 29, 2002, defendant and his daughter arrived at the party at approximately 6:00 p.m. and left between 9:00 and 9:30 p.m., and defendant did not leave the party between those hours.

Urzua testified that at approximately 8:00 p.m., on July 29, 2002, she received a phone call informing her that something happened to Esparza. She went outside and saw him lying on the ground. She walked over to him with Davey, held Esparza's hand and touched his shoulder, remaining with him with Davey until the police arrived. Esparza only asked for his mother, and his last words were that he was sorry and loved her. He never mentioned Angel or the projects while Placencia was there. Placencia was in her yard but right above where Esparza was on the ground. She only came outside her fenced yard when Esparza's mother arrived.

DISCUSSION

I. The trial court did not abuse its discretion in excluding some expert testimony.

Dr. Robert Shomer, a forensic psychologist and expert on witness identification, testified for the defense that witness identifications can be highly unreliable. Their reliability is impacted by the length of interaction in a "directed way" between the witness and suspect, the witness's familiarity with the suspect, the lighting, whether cross-racial or cross-age identification is involved, and whether there was violence and stress during the observation, among other factors. While a long interaction with someone in a "directed way" may be accurate in determining who that person is, seeing someone in a relatively sudden, unexpected interaction, one that may involve violence, is not. Further, memory becomes less accurate as time passes, and once a witness has

committed to an identification the witness becomes more convinced of it with time. Showing an eyewitness photographs in a gang book, obtaining a tentative selection and showing a six-pack with the same individual two weeks later, creates familiarity and signals that the person is of significance. Dr. Shomer also testified as to procedural deficiencies in identifications, such as admonitions that are one-sided and displaying a six-pack, rather than six photographs one at a time, which encourages a comparative selection of the person most closely resembling the suspect.

During the examination of Dr. Shomer, the following exchange took place: "Q. In general, how accurate are eyewitness identifications? How reliable are they? A. The least reliable means of identification we have — [PROSECUTOR]: Going to object to that as calling for speculation. THE COURT: Let me see counsel at sidebar. [PROSECUTOR]: Beyond the scope of his expertise."

At the sidebar, defense counsel indicated that his question was designed to show the inaccuracy of eyewitness identifications. The prosecutor argued that it called for the ultimate conclusion and for speculation and that Dr. Shomer could not opine on the general accuracy of eyewitness identifications. The trial court sustained the objection, and struck the partial answer given, stating: "That's also almost calling for the ultimate conclusion in this case. You can talk about his research; but as far as putting a number on the number that are accurate, that's trying to say there's a certain percentage of eyewitnesses in the future that's also wrong. I think that that's putting the wrong spin on his testimony."

Following this sidebar, defense counsel asked Dr. Shomer if studies have shown eyewitness identification to be an accurate form of identification. The doctor testified that it was not. The prosecutor objected as overbroad and beyond his expertise. The trial court sustained the objection and struck the answer.

At another sidebar, the trial court indicated that the question was misleading because certain forms of eyewitness identification are very accurate and some are less accurate. It stated, "[T]o say that eyewitness identification flat-out is the worst, it is just

flat-out not true." The question attempted, according to the trial court, to "paint [with] a broad brush . . . [and its not true] that all eyewitness identification [*sic*] are the worst."

Defendant made a motion for a new trial on the ground that Dr. Shomer's answers to the challenged questions regarding the general accuracy of eyewitness identifications should not have been excluded. The trial court denied the motion.

Defendant contends that the trial court abused its discretion when it excluded the challenged expert identification testimony and deprived him of his constitutional right to present a defense. He argues that the questions regarding the accuracy of eyewitness identifications were relevant to undermine Placencia's identification of him as the shooter. These contentions are meritless.

A. Abuse of discretion

We review the trial court's rulings on the admission of expert testimony for abuse of discretion. (*People v. McDonald* (1984) 37 Cal.3d 351, 373, disapproved on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 924.) We find no abuse here.

"Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The trial court excluded Dr. Shomer's responses to only two inquiries: "In general, how accurate are eyewitness identifications? How reliable are they?" and "Based on that research [that Dr. Shomer studied], has eyewitness identification been shown to be an accurate form of identification?" It apparently found the questions seeking Dr. Shomer's opinion of the general accuracy of eyewitness identifications to be so overbroad as to be of de minimis relevance. The broad category of "eyewitness identifications" embodies numerous types of identifications, including field showups, lineups, six-packs, and gang photography books, not all having the same degree of reliability. Further, the reliability of an eyewitness identification, as indicated in Dr. Shomer's other testimony, is greatly affected by cross-racial or cross-age identification, the time the eyewitness has to observe the suspect, the motivation for observing, the lighting, the distance from the suspect that the observation was made and a

myriad of other factors. The overbroad and ambiguous questions probing into the general reliability of eyewitness identifications was meaningless and therefore had little tendency to prove the accuracy of Placencia's identification.

Defendant argues that "the defense questioning of Dr. Shomer as to the specific reasons why eyewitness identifications can be unreliable was foreclosed by the court's ruling disallowing this testimony." This assertion is specious. The trial court did not foreclose such inquiry but merely sustained objection to two specific questions. The transcript reflects that defendant questioned Dr. Shomer at length about the reasons for the unreliability of eyewitness identifications.

B. Constitutional right to present a defense

We further reject defendant's claim that he was deprived of his constitutional right to present a defense by virtue of the excluded evidence. "'As a general matter, the "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." [Citations.] Although completely excluding evidence of an accused's defense theoretically could rise to this level . . . .'" (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

While the trial court precluded Dr. Shomer from opining on whether, in general, eyewitness identifications are reliable, there was substantial evidence germane to the reliability of Placencia's identification. As described above, Dr. Shomer testified at length to the factors that affect the reliability of an eyewitness identification.[4] Moreover, he was able to get into evidence during his testimony the virtually identical information excluded by the challenged rulings. He testified that "[e]yewitness I.D. is not highly reliable under the best of circumstances." The prosecution's objection to that question was overruled.

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[4] Dr. Shomer's testimony consumed 78 pages of the reporter's transcript.

C. Harmless error

Even if the trial court erred in excluding Dr. Shomer's responses to the two questions at issue, that error was harmless in that it is not reasonably likely that a different result would have ensued had it not been made. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1317.) As set forth above, because there was substantial evidence regarding the reliability of eyewitness identification and substantially similar evidence to that which was excluded, it is not reasonably likely that admission of the excluded evidence would have changed the result.

II. The trial court did not abuse its discretion in allowing evidence of Placencia's fear for her safety and altruistic motive to testify.

During Placencia's testimony, the following colloquy occurred: "[PROSECUTOR]: Q. [A]re you a little afraid to be here today? [DEFENSE COUNSEL]: Objection, relevance. THE COURT: It's overruled. You may answer. THE WITNESS: No. [PROSECUTOR]: Q. The last time you came to court, did you wear a wig and glasses? A. Yes. Q. And why was that? [DEFENSE COUNSEL]: Your Honor, relevance. THE COURT: It's overruled. [¶] You can answer. THE WITNESS: Because I felt afraid and I was scared of the family of the defendant."

After this exchange, Placencia testified to what she observed on the night of the shooting. Then additional questions were propounded: "Why are you willing to come forward and talk about this -- [DEFENSE COUNSEL]: Objection, your Honor, relevance. THE COURT: It's overruled. [PROSECUTOR]: Q. Why are you willing to come forward and talk about this? A. Well, because that's why -- when -- when one is silent, that's why a lot of people -- well, a lot of crimes -- well, you know, like the person who kills someone, umm, you know, never comes out. I mean, well, that's why I decided to speak."

Detective Herman had already testified that at the April 15, 2003 interview, Placencia said she moved for fear for her life and that she was told that Esparza was killed for cooperating with the police.

Defendant contends that the trial court abused its discretion under Evidence Code section 352 in allowing evidence of Placencia's fear and motive for testifying. He argues that the probative value of questions regarding her fear was "minuscule" while its prejudicial effect was "enormous." This testimony, he argues, only aroused the jury's emotions and inflamed it that this was a gang case. He also argues that this evidence "directly undercut the defense theory . . . premised on a denial of culpability, misidentification tied to reasonable doubt, and alibi." Her statement that she testified because silence allows criminals to go unpunished, he asserts, allowed her to be portrayed as a heroine.

The Attorney General contends that defendant forfeited his claim that the trial court should have excluded the challenged evidence under Evidence Code section 352 by failing to raise it in the trial court. We agree. An objection on Evidence Code section 352 grounds must be specifically made at trial in order to preserve if for appeal. A relevance objection is insufficient to do so. (Evid. Code, § 353.)

Even if the claim under Evidence Code section 352 had not been waived, we would nonetheless reject it. Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "Review of a trial court decision pursuant to Evidence Code section 352 is subject to abuse of discretion analysis. [Citations.]" (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 352.) "[T]he trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) "When the question on appeal is whether the trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge." (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) "'[I]n

most instances the appellate courts will uphold its exercise whether the [evidence] is admitted or excluded.'" (*People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1532.)

A. Relevance

Evidence of Placencia's fear and reason for nonetheless coming to court was not only relevant, but central to this matter. As previously stated, relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) A witness's attitude toward presenting evidence is always relevant. (Evid. Code, § 780, subd. (j); *People v. Green* (1980) 27 Cal.3d 1, 20.) Fear of retaliation of a witness which affects the witness's testimony is relevant. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946.)

Placencia was the only eyewitness to identify defendant as Esparza's killer. Defendant pressed his theory that he was at a birthday party when the murder occurred and was misidentified. In support of that assertion, he focused on the evidence that Placencia did not positively identify him when initially questioned by police, but did so only months later and after several identifications; the gang book, two six-pack identifications, a lineup, and identification of defendant at the preliminary hearing. Defendant's expert claimed that repeated identifications made the last identification less reliable, although Placencia indicated she was more positive later. Additionally, Placencia gave more complete and inculpating information to the police in subsequent interviews than in the initial interviews and admitted lying to the police and giving misinformation initially. The challenged testimony was required to explain why she provided false and inconsistent statements initially and was more certain in her trial testimony. The prosecutor attempted to show that the initial inaccuracies and omissions in Placencia's statements resulted from fear of what defendant or his fellow gang members would do to her when they learned she had cooperated with the police. Esparza's mother told her that Esparza was killed because of such cooperation. By the time of trial, however, Placencia had moved and was therefore less frightened. She also had a sense of moral duty to insure that the murderer was brought to justice. Defendant has tacitly, if not inadvertently, acknowledged the relevance of the challenged testimony

by arguing that it undercut his theory of the case. This amounts to an admission of its "tendency . . . to . . . disprove . . . any disputed fact that is of consequence to the determination of the action. . . ." (Evid. Code, § 210.)

B. Prejudice

This very strong relevance outweighed any prejudice. Defendant claimed that the testimony sought to arouse the emotions of the jury, emphasize the gang element of the case and make Placencia into a heroine. The jury was well aware that this was a gang case. They heard evidence of the ruthless murder of Sanchez by rival gang members. They heard from the prosecution's gang expert about the nature of gang criminal activity, retaliation and intimidation of entire neighborhoods and a gangs' harsh treatment of snitches. It likely came as no surprise to hear that Placencia feared for her safety and that of her family because of her cooperation with police. Additionally, other testimony was presented regarding Placencia's fear to which no objection was interposed. For example, Detective Herman testified that Placencia moved from the neighborhood shortly after the shooting out of fear. Thus, any tendency of evidence of Placencia's fear to prejudice and impassion the jury was blunted by the vast amount of related testimony admitted at trial without objection.

C. Harmless Error

Even if the trial court erred in allowing Placencia's testimony, that error was harmless in that it is not reasonably probable that had it been admitted defendant would have obtained a more favorable result. (*People v. Watson, supra*, 46 Cal.2d at p. 836; *People v. Espinoza, supra,* 95 Cal.App.4th at p. 1317.) As previously discussed, the challenged evidence was merely duplicative of other evidence admitted regarding gang involvement in the murder, Placencia's fear and related matters. Even without the challenged testimony, the jury would clearly have understood that Placencia was in justified fear for her life by cooperating with police. Indeed, there was evidence before the jury that Esparza was likely murdered for that reason.

III. The California death penalty law is constitutional.

Defendant was found guilty of first degree murder with the special circumstances of active participation in a criminal street gang, murder of a witness and murder by lying in wait. He was sentenced to life in prison without the possibility of parole under section 190.2, subdivision (a) plus 25 years to life for the firearm enhancement.

Defendant contends "that [California's] death penalty law is unconstitutional under the United States and California Constitutions because it fails to narrow the class of death-eligible murderers and thus renders the overwhelming majority of intentional first degree murderers death eligible." He argues that the proliferation of special circumstances has undermined the narrowing function of California law. The addition in 2000 of the street gang special circumstance, along with the other 21 special circumstances, make "almost [all] first degree murderer[s] . . . death eligible . . . ."

The Attorney General contends that defendant does not have standing to raise a claim that the death penalty is unconstitutional because he did not receive a death sentence, but only received life without the possibility of parole.

A. Standing

We agree with the Attorney General that defendant lacks standing to claim that the death penalty is cruel and unusual punishment as he was not sentenced to death. (See *In re Cregler* (1961) 56 Cal.2d 308, 313 ["[O]ne will not be heard to attack a statute on grounds that are not shown to be applicable to himself"].) The narrowing-and-selecting requirement of the Cruel and Unusual Clause does not extend beyond death sentences. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 995-996 [the requirement that a capital sentence is cruel and unusual punishment under the Eighth Amendment unless there is an individualized determination that the punishment is appropriate does not extend to a sentence of life without parole]; *Houston v. Roe* (9th Cir. 1999) 177 F.3d 901, 906 ["We therefore hold that the California Penal Code does not violate the Eighth Amendment by

failing to extend the *Godfrey*[5] doctrine to LWOP [life without the possibility of parole] crimes"].)

Defendant relies on *People v. Anderson* (1987) 43 Cal.3d 1104 (*Anderson*) and *Owen v. Superior Court* (1979) 88 Cal.App.3d 757 (*Owen*) to support his claim that he has standing. These cases do not assist defendant. In *Anderson*, the defendant had received the death penalty. In *Owen*, a defendant who was faced with two special circumstances allegations sought pretrial review of the propriety of such allegations in a case in which no death had occurred. The appellate court found, among other things, that the special circumstances allegations would not be permissible in such a case even if the prosecution sought only life without parole.

B. Constitutionality

Even if we were to consider defendant's challenge to the death penalty law on the merits, we would reject it. The Eighth Amendment imposes on California "a constitutional responsibility to tailor and apply its [death penalty] law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.'" (*Godfrey v. Georgia, supra,* 446 U.S. at p. 428.) As a general rule, the Eighth Amendment requires that the class of murderers punished by death be narrower than the class of murderers as a whole. (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 244; *Zant v. Stephens* (1983) 462 U.S. 862, 877.)

Defendant offers no legal or factual support for his claim that the addition, in 2000, subdivision (a)(22) of section 190.2 (the criminal street gang special circumstance) casts the death penalty net so broadly that now "almost every" first degree murderer is death eligible. The language in *People v. Michaels* (2002) 28 Cal.4th 486, 541, in connection with a claim of the non-narrowing effect of section 190.3 is pertinent here.

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5 *Godfrey v. Georgia* (1980) 446 U.S. 420, 428.

Defendant "'has not demonstrated on this record, or through sources of which we might take judicial notice, that his claims are empirically accurate, or that, if they were correct, this would require the invalidation of the death penalty law.' Section 190.2, which sets out the special circumstances, on its face provides some criteria that may narrow the class of death-eligible persons. Contrary to defendant's contention, we cannot simply deduce from the language and structure of section 190.2 and the cases interpreting that section that this narrowing is constitutionally inadequate."

Our Supreme Court has continuously rejected similar "failure to narrow" attacks upon the state's death penalty statute. In *People v. Sanchez* (1995) 12 Cal.4th 1, 60-61, it rejected an argument, virtually identical to that presented here, made in the context of a claim that the 1978 death penalty law was unconstitutional under the state and federal Constitutions because it failed "to narrow the class of death-eligible murderers and thus renders 'the overwhelming majority of intentional first degree murderers' death eligible." In *People v. Sanchez*, the defendant claimed that although any one of the special circumstances in section 190.2 taken alone might not be unconstitutional, taken together, they virtually cover all first degree murders and thus perform no narrowing function. The Court stated: "We have repeatedly considered and rejected this identical claim. . . . [T]he high court has recognized that 'the proper degree of definition' of death-eligibility factors 'is not susceptible of mathematical precision, . . .'" (*People v. Sanchez, supra,* at p. 61; see also *People v. Crittenden* (1994) 9 Cal.4th 83, 154-155; *People v. Wader* (1993) 5 Cal.4th 610, 669 [rejecting argument that death penalty law is unconstitutional because it contains so many special circumstances that it fails to perform required narrowing function].)

While acknowledging that the Supreme Court has previously rejected defendant's claim, he argues that the issue should be revisited because of the 2000 addition of the criminal street gang special circumstance to the then existing list of special circumstances. But there have been several California Supreme Court decisions since the addition of the street gang special circumstance in which it has continued to reject claims that the sheer number of special circumstances in section 190.2 demonstrates that the law

does not require the narrowing function required by the Eighth Amendment to the United States Constitution. (See *People v. Boyette, supra,* 29 Cal.4th at pp. 439-440; *People v. Koontz* (2002) 27 Cal.4th 1041, 1095; *People v. Benavides* (2005) 35 Cal.4th 69, 104 ["defendant contends that because sections 189 and 190.2 overlap, rendering virtually all premeditated murders death eligible, California's death penalty scheme fails to adequately perform the required narrowing function. We have repeatedly held to the contrary"].) We are bound to follow these rulings. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

IV. Defendant did not suffer cruel and unusual punishment.

The trial court sentenced defendant to life in prison without the possibility of parole under section 190.2, subdivision (a). He contends that his sentence is unconstitutional under both the California and United States Constitutions (Cal. Const., art. I, § 17; U.S. Const., 8th Amend.) because it is grossly disproportionate to the gravity of his offense. The Attorney General contends that this contention has been forfeited because it was not raised in the trial court. We agree with the Attorney General.

The California Supreme Court has repeatedly held that constitutional objections, like other objections, must be interposed in order to preserve them for appeal. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 250.) This principle has been applied to claims of cruel and unusual punishment. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27; *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8.)

Even if not waived, we would reject this claim. In California, "[t]he judiciary may not interfere with the authority of the Legislature to define crimes and prescribe punishment unless a prescribed penalty is so severe in relation to the crime that it violates the constitutional prohibition against cruel or unusual punishment. [Citations.] Nevertheless, a sentence may violate article I, section 17, of the California Constitution if it is so disproportionate to the crime for which it is imposed that it 'shocks the conscience and offends fundamental notions of human dignity.' [Citation.]" (*People v. Ingram*

(1995) 40 Cal.App.4th 1397, 1412, overruled on other grounds in *People v. Dotson* (1997) 16 Cal.4th 547.)

In *In re Lynch* (1972) 8 Cal.3d 410 (*Lynch*), our Supreme Court articulated the relevant factors to consider in analyzing whether a punishment is cruel or unusual under the California Constitution. *Lynch* requires consideration of the nature of the offender and the offense, with particular regard to the danger both present to society (*id.* at p. 425), comparison of the punishment with the penalty for more serious crimes in the same jurisdiction (*id.* at p. 426), and comparison of the punishment to the penalty for the same offense in different jurisdictions. (*Id.* at p. 427.)

Under the federal Constitution, punishment may be considered unconstitutionally excessive and in violation of the Eighth Amendment's prohibition against cruel and unusual punishment if it is "grossly out of proportion to the severity of [his] crime." (*Gregg v. Georgia* (1976) 428 U.S. 153, 173.) In *Harmelin v. Michigan*, *supra*, 501 U.S. 957, of the five separate opinions, seven justices supported a proportionality review based on the gravity of the offense when compared to the severity of the sentence. We do not find the federal standard significantly different from the California standard and if anything, it is subsumed within the *Lynch* analysis.

With respect to the first *Lynch* factor, the nature of the offender and the offense, defendant fails to specify what about defendant and his offense render the sentence imposed excessive. His brief is noteworthy for its complete absence of a factual discussion on this issue. The next step in the *Lynch* analysis is to compare defendant's punishment with punishments in California for more serious crimes. Again, defendant makes no effort in his appellate brief to make such a comparison. Finally, *Lynch* requires that we compare the punishment imposed with punishments in other states. Once again, defendant has submitted no argument with regard to this factor.

"'[I]n our tripartite system of government it is the function of the legislative branch to define crimes and prescribe punishments . . . .' [Citation.] 'The choice of fitting and proper penalties is not an exact science, but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration

of relevant policy factors, and responsiveness to the public will; in appropriate cases, some leeway for experimentation may also be permissible.' [Citation.] 'Reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.' [Citations.] 'Only in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive. [Citations.]' [Citation.]" (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1213-1214 [rejecting cruel and unusual punishment challenge to section 12022.53, subd. (d)].)

We do not find defendant's punishment of life without the possibility of parole for his cold-blooded murder of Esparza to be one of those rare circumstances in which the punishment is out of all proportion with the offense nor do we find the sentence imposed so disproportionate as to "'shock[] the conscience and offend[] fundamental notions of human dignity.' [Citation.]" (*People v. Ingram*, *supra*, 40 Cal.App.4th at p. 1413 [finding no cruel or unusual punishment of sentence of 61 years to life on two counts of residential burglary where the defendant had drug and alcohol problems and a lengthy record], overruled on other grounds in *People v. Dotson*, *supra*, 16 Cal.4th 547.)

V. The parole revocation fee must be stricken.

The trial court imposed both a restitution fine in the amount of $5,000 pursuant to section 1202.4, subdivision (b) and a parole revocation fine in the same amount pursuant to section 1202.45, ordering the latter stayed pending successful completion of parole.

Defendant contends that the parole revocation fee should be stricken. He argues that it may not be imposed where there is no possibility of parole, whether or not there is an additional determinate or indeterminate portion of the term on which parole could conceivably be granted. This contention has merit.

Section 1202.45 provides: "In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to

subdivision (b) of Section 1202.4. This additional parole revocation restitution fine shall be suspended unless the person's parole is revoked. Parole revocation restitution fine moneys shall be deposited in the Restitution Fund in the State Treasury."

In *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, our colleagues in Division Five of this Court were presented with a defendant who had been convicted of first degree, special-circumstance murder of one person, for which he received a life without the possibility of parole sentence, and of second degree murder of another person, for which he received an indeterminate life sentence. The Court of Appeal concluded that although the defendant's indeterminate sentence allowed for parole, because there was a de minimis likelihood that he would ever receive parole because of his life without the possibility of parole sentence, the trial court did not err in failing to impose a parole revocation fine. In dictum, the Court of Appeal stated: "The issue of whether section 1202.45 applies when only a sentence of life imprisonment without possibility of parole is imposed is the easiest to resolve. When there is no parole eligibility, the fine is clearly not applicable." (*Id*. at p. 1183.)

While we have some reservations regarding Division Five's conclusion that a parole revocation fine is unnecessary where there are multiple convictions, one being for life without the possibility of parole, we need not decide that question. The facts before us are more analogous to the situation where there is only a sentence of life imprisonment without the possibility of parole. Defendant was convicted only of special circumstance first degree murder. The 25-years-to-life sentence resulted from the firearm enhancement, which is not a separate offense, but an appendage to the conviction. Thus, if the murder conviction is reversed, the enhancement must go with it. (See *People v. Bracamonte* (2003) 106 Cal.App.4th 704, 711 [regarding necessity of staying enhancement when sentence on underlying count stayed, court stated that failure to do so "'has the [improper] effect of elevating the enhancement to the status of an offense. Enhancements are not offenses, they are punishments. . . .'"].)

The Attorney General requests that if we reverse the parole revocation fee, we remand for the trial court to recalculate the restitution fine. It speculates that the $5,000

restitution fine may have been imposed because the trial court believed that fine had to be the same as the parole revocation fine. Since a restitution fine up to $10,000 can be imposed, the trial court might, the Attorney General argues, impose a higher sum now that it is not required to make that fee the same as the parole revocation fine. We reject this contention. The Attorney General points to nothing in the record to suggest that the trial court imposed a $5,000 restitution fee only because that was the amount of the parole revocation fee and would now likely impose a different fee. This assertion is pure speculation in which we are not inclined to engage.

DISPOSITION

The parole revocation fine is stricken, and the judgment is otherwise affirmed. The trial court is directed on remand to amend the abstract of judgment accordingly.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

ASHMANN-GERST

We concur:

_____, P. J.

BOREN

_____, J.

DOI TODD